

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C.
f/k/a FIBER SYSTEMS, LLC

v.

VERIZON NEW ENGLAND, f/k/a
NEW ENGLAND TELEPHONE
AND TELEGRAPH COMPANY

and

NORTHEAST UTILITIES SERVICE COMPANY
d/b/a WESTERN MASSACHUSETTS
ELECTRIC CO.

ANSWER OF
VERIZON MASSACHUSETTS

Pursuant to 220 CMR § 45.03(4), Verizon Massachusetts (“Verizon MA”) files this Answer to the Petition for Interim Relief and Complaint filed with the Department on August 14, 2002, by Fiber Technologies Networks (“Fibertech”). The Department should deny Fibertech’s request for interim relief and dismiss its Complaint.

I. INTRODUCTION AND SUMMARY

Fibertech has unlawfully placed its fiber facilities on nearly 700 Verizon MA poles in Agawam, Easthampton, Northampton, and Springfield by failing to obtain from Verizon MA licenses for its occupancy of our solely and jointly-owned telephone poles and, in some instances, failing to secure the required prior approvals from municipal

authorities. Fibertech's conduct constitutes a clear violation of the parties' Aerial License Agreements and Massachusetts law. In many instances, Fibertech has placed these illegal attachments in an unsafe manner that jeopardizes the safety of Verizon MA employees, the employees of other companies who attach to the poles (electric companies, other telecommunications carriers, and cable television providers), and the general public. Verizon MA has formally notified Fibertech that these unlawful attachments constitute a material breach of its License Agreements and must be removed to prevent termination of those agreements in accordance with their terms. *See* Exhibit 1 attached to this Answer.

Despite the fact that Verizon MA repeatedly brought these extensive violations to Fibertech's attention, it failed to take any action to cure them. Consequently, to enforce our rights under the License Agreements and prevent Fibertech from making further unlawful and potentially unsafe attachments, Verizon MA filed suit against Fibertech in the Superior Court of Hampden County. Attached as Exhibit 2 of this Answer is a copy of Verizon MA's complaint filed with the court on August 8, 2002, and the affidavits of Keefe B. Clemons, Carol J. Leone, and Robert Kerwood accompanying the complaint. In the civil action, Verizon MA sought among other things injunctive relief requiring Fibertech to cease any further unauthorized attachments and to remove the unlawful attachments it already placed on Verizon MA's poles. Western Massachusetts Electric Company ("WMECO") a co-owner of poles in Agawam, Easthampton, and Springfield also filed an action against Fibertech on August 13th, in Hampden County Superior Court based upon Fibertech's unlawful attachments on poles that WMECO owns jointly with Verizon MA.

Following a hearing on August 14, the Superior Court justice entered an order granting Verizon MA and WMECO a preliminary injunction that: (1) prohibits Fibertech from making any further attachments to any poles owned by Verizon MA or jointly-owned by Verizon MA and WMECO without express written authorization, and (2) requires Fibertech to remove within 45 days *all* attachments of any kind on all poles owned by Verizon MA and WMECO for which it does not have a license or pay \$400,000 to be used by Verizon MA and WMECO to correct unsafe conditions on poles. A copy of the Court's order is attached as Exhibit 3. The Court based its decision on a finding that:

Fibertech has made attachments to plaintiffs' poles without right to do so and is therefore committing a continuing trespass with respect to each such pole. Plaintiffs, consequently, have established a very strong **likelihood** of success on their claims that Fibertech had no right to make attachments when it did and no right presently to these attachments on Plaintiffs' poles.

See Exhibit 3 at 5-6. The Court further found that Fibertech was acting in bad faith and that "it is very clear that Fibertech acted wrongfully in erecting the attachments and did so to obtain an inappropriate tactical advantage in litigation it knew was forthcoming." *See id.*, at 7 and 9.

Fibertech not only ignored Verizon MA's and WMECO's rights as the Court found, but it also ignored the rights of cities and towns by failing to obtain municipal permits for placing its facilities on public ways, as required by Massachusetts law. In both Easthampton and Northampton, Fibertech didn't bother to obtain the required municipal permits. As noted recently by the Mayor of Easthampton, Fibertech "just

blew in and blew out” of town with its attachments.¹ *See* attached Exhibit 4. The Mayor also expressed particular concern with the placement of Fibertech’s unlawful attachments in relation to the cities’ fire alarm facilities. *Id.*

Because Verizon MA and WMECO have sought to enforce their rights to stop further unauthorized attachments and have existing unlawful attachments removed, Fibertech filed this Complaint in retaliation with the Department. The Complaint is, however, nothing more than an effort to muddy the waters and divert attention from the real issue here – the illegal and unsafe attachments by Fibertech to nearly 700 poles in the Springfield area – which caused Verizon MA to take the reasonable and measured action it has taken against Fibertech, *i.e.*, notifying Fibertech that it must cure its breach of the License Agreements or risk termination of those agreements.

There are two separable parts of Fibertech’s Complaint. The first is its request for interim relief in which it asks the Department to prohibit Verizon MA and WMECO from: (1) enforcing their License Agreements which permit them to terminate the agreements for a failure to cure a material breach and annulling termination notices already served on Fibertech (Complaint at 14); (2) dismantling any portion of Fibertech’s facilities, attaching liens on its facilities or franchises, or drawing on performance bonds (*Id.*); (3) taking any action to force payment of charges for make-ready work relating to Fibertech’s Springfield and Worcester networks (*Id.*); and (4) taking any retaliatory action against Fibertech, including but not limited to canceling the License Agreements, charging multiple annual rental rates, or refusing to process any current or future applications for access to poles or conduit in the Springfield and Worcester areas. The

¹ The Mayor’s characterization of how Fibertech made the attachments fairly states its conduct. On information and belief, Verizon MA understands that Fibertech placed a number of the attachments on

second portion of the Complaint is a request for the Department to conduct a sweeping examination into Verizon MA's and WMECO's licensing practices.

Fibertech has failed to articulate any facts or arguments that would provide cause for the Department to grant it interim relief or to conduct the investigation Fibertech requests. Indeed, the request for interim relief is now moot because of the Court's ruling of August 19, 2002. The Complaint consists of nothing more than gross general allegations about Verizon MA's conduct regarding access to poles and conduit together with a box full of documents that allegedly support its claims. Fibertech does not detail a single specific instance of an unreasonable practice or charge by Verizon MA or point to a single specific document that purportedly supports any of its claims. Incredibly, Fibertech doesn't discuss any of the specific facts relating to the illegal attachments that provided Verizon MA with cause to declare a material breach of the License Agreements, thereby precipitating Fibertech's filing of this Complaint. Essentially, Fibertech makes bald allegations about Verizon MA's conduct and leaves it up to the Department to sort through the pile of documents filed with the Complaint to find the "facts" purportedly supporting Fibertech's claims. In short, Fibertech's Complaint provides no facts that establish a basis for the Department to grant the interim relief requested or conduct the investigation Fibertech requests.

In contrast, as discussed in Verizon MA's civil complaint attached as Exhibit 2 and the Superior Court's recent order, the facts on which Verizon MA acted to seek termination of the License Agreements are compelling and fully justify its actions. As the Superior Court found following a hearing and a review of the briefs and affidavits

the weekend of June 23, 2002, under the cloak of darkness during the evening.

submitted by the parties, Fibertech had no justification for attaching to Verizon MA and WMECO poles without licenses. The Court found that Fibertech acted in bad faith, and there was no legal authority anywhere supporting its resort to self-help even if it felt that Verizon MA and WMECO were not acting quickly enough to provide it with access. *See* Exhibit 3 at 7.

The simple fact is that Fibertech got caught with its hand in the cookie jar by placing illegal attachments on Verizon MA's poles in violation of its License Agreements and Massachusetts law. This Complaint is merely Fibertech's transparent effort to divert attention from its own unlawful activities by retaliating against Verizon MA and WMECO for asserting their rights. The Department should not buy into Fibertech's stratagem to evade responsibility for its unlawful conduct but should deny the request for interim relief and dismiss the Complaint.

II. THE DEPARTMENT SHOULD DENY FIBERTECH'S REQUEST FOR INTERIM RELIEF.

A. Factual Background

On or about March 7, 2000, Verizon MA entered into the first of two Aerial License Agreements with Fibertech's predecessor, Fiber Systems, L.L.C., that established the terms and conditions under which Verizon MA agreed to allow Fibertech to place and maintain "attachments" on Verizon's solely-owned poles. *See Clemons Affidavit*, attached to Verizon MA's Superior Court Complaint. On or about March 31, 2000, Verizon MA and WMECO entered into a second Aerial License Agreement with Fibertech that established the terms and conditions under which Fibertech would be permitted to place and maintain attachments on telephone poles owned jointly by Verizon

MA and WMECO. *Id.* The relevant provisions of these License Agreements are substantially identical.

Pursuant to the License Agreements, Fibertech was obligated to apply for and have received a license from Verizon MA and WMECO prior to placing any attachments.

Article VII(A) of the License Agreements state:

Before Licensee shall attach to any pole, Licensee shall make application for and have received a license therefor in the form of APPENDIX III, Forms A-1 and A-2.

Before any license would be issued to Fibertech to attach to a particular pole, the parties were required to perform a joint field survey to determine the adequacy of the pole to accommodate the proposed attachments and to determine what, if any, “make-ready work” was required to prepare the pole for the attachment and to provide the basis for estimating the cost of the work. *See* License Agreements, Articles I(E) and (F), VIII(A).

Fibertech was required to place and maintain all proposed attachments in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures (“Blue Book”), Electric Company Standards, the National Electrical Code (“NEC”), the National Electrical Safety Code (“NESC”) and rules and regulations of the Occupational Safety and Health Act (“OSHA”) or any governing authority having jurisdiction over the subject matter. *See* License Agreements, Article V(A). If Verizon MA determined, as a result of the joint field survey, that a pole to which Fibertech sought to attach was “inadequate or otherwise need[ed] rearrangement of the existing facilities” to accommodate the requested attachments in accordance with the foregoing specifications, Verizon MA would notify Fibertech of the estimated cost of any make-ready work required to prepare the pole. *See* License Agreements, Article VIII(C).

Moreover, Verizon MA reserved the right to deny Fibertech a license if Verizon MA determined that the communications space on the pole could not reasonably be arranged or replaced to accommodate Fibertech's proposed attachments. *See* License Agreements, Article VIII(B). Further, Fibertech was required to pay for the make-ready work before Verizon MA would schedule the work within its "normal work load schedule." *See* License Agreements, Articles IV(A) and VIII(C) and (H).

The Agreements also obligated Fibertech to construct and maintain, at its own expense, any approved attachments in a safe condition and in a manner acceptable to Verizon MA, and Verizon MA reserved the right to make periodic inspections of Fibertech's attachments at Fibertech's expense. *See* License Agreements, Articles IX(A) and XI(A).

In addition to obtaining the licenses from Verizon MA, Fibertech was responsible "for obtaining from the appropriate public and or private authority any required authorization to construct, operate and /or maintain its attachment on public and property at the location of [Verizon MA's and/or WMECO's] poles . . . and shall submit evidence of such authority before making any attachments on such public and/or private property." *See* License Agreements, Article VI(A). Similarly, Fibertech was obligated to "comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreements]." *See* License Agreements, Article VI(C).

Verizon MA is entitled to terminate a License Agreement with Fibertech and all authorizations granted pursuant thereto if Fibertech "shall fail to comply with any of the terms and conditions of th[e] Agreement[s] or default in any of its obligations under th[e]

Agreement[s], or if [Fibertech's] facilities are maintained or used in violation of any law and [Fibertech] shall fail within thirty (30) days after written notice . . . to correct such default or noncompliance.” *See* License Agreements, Article XVIII(A). In the event of termination of the Agreements, Fibertech is obligated to remove its attachments from Verizon MA's poles within six months of the date of termination. *See* License Agreements, Article XVIII (C). If any of Fibertech's attachments are found attached to Verizon MA's poles without a license, Verizon MA, “without prejudice to its other rights or remedies under [the Agreements] (including termination) or otherwise, may impose a charge and require [Fibertech] to submit in writing, within fifteen (15) days after receipt of written notification . . . of the unauthorized attachment, a pole attachment application.” If Fibertech fails to submit the requisite application in a timely manner, Fibertech is obligated to “remove its unauthorized attachment within fifteen (15) days of the final date for submitting the required application, or [Verizon MA] may remove [Fibertech's] facilities without liability, and the expense of such removal shall be borne by [Fibertech].” *See* License Agreements, Article XII(A).

In late June 2002, Verizon MA discovered that Fibertech placed unauthorized attachments on approximately 700 poles covered by the License Agreements in Agawam, Northampton, Easthampton, and Springfield. Many of these unauthorized attachments were installed improperly and not in compliance with the specifications set forth in the License Agreements, giving rise to serious and substantial safety hazards for the public, Verizon MA and WMECO personnel, as well as other pole users including other telecommunications carriers and cable television providers. *See* Kerwood Affidavit at ¶¶

8-14 attached to Verizon MA's Superior Court Complaint and the Leone Affidavit, at ¶¶ 14-15 also attached to that Complaint.

In particular, in placing its attachments Fibertech did not utilize guying, a metal cable of high-tensile strength that is attached to a pole and anchor rod, or another pole, for the purpose of reducing pole stress caused by the installation of high-tension wires. Additionally, Fibertech violated the NESC distance requirements by installing its cables in certain instances within 40 inches (measured vertically) of electrical wires in the supply space, and within 12 inches of cable in the communications space, creating a serious risk of energizing communications lines and posing a potentially life-threatening hazard for technicians working on and around the poles. In some instances, Fibertech installed extension arms in a transparent attempt to create the appearance of compliance with the 40-inch vertical distance requirement, but because the extension arms extend horizontally they do not create a 40-inch vertical separation as required by code. Further, Fibertech "boxed-in" poles by improperly placing attachments on both sides of poles in contravention of construction requirements, making pole replacement more difficult and preventing access by other pole users to their facilities. Fibertech also created "mid-span crossovers" by attaching lines that run both above and below the lines of other users creating further risk of damage to the facilities of other users and increasing the likelihood of causing communications lines to become energized with high voltage electricity from the power lines of the electric company. Mid-span crossovers may cause friction between lines in windy conditions posing the threat of damage to lines, preventing access to lines by other users, and increasing the risk of electrifying communications lines which would pose a substantial danger. Moreover, Fibertech

installed lines to CATV through-bolts, crushing the cable in some instances, and creating a further barrier for CATV technicians to access the CATV cable. Finally, Fibertech placed attachments on old, deteriorated poles that cannot safely accommodate Fibertech's high-tension attachments. Due to their age and deteriorated condition, there is a danger that the poles may collapse threatening the safety of motorists and passers-by and creating an additional risk of damage to the lines and equipment of the joint owners and other users on those poles. *See Kerwood Aff.* at ¶¶ 15-21.

Exhibit 5 of this Answer contains photographs of several examples of the unsafe conditions that Fibertech has created through its unlawful attachments on Verizon MA poles. Fibertech has not remedied these unsafe conditions.

Finally, in placing these unsafe, unauthorized attachments, Fibertech also ignored the local approval process. *See* attached Exhibit E and *Leone Aff.* at ¶ 16.

By letter dated June 28, 2002, Verizon MA notified Fibertech of the unauthorized attachments in Easthampton, and demanded that Fibertech take immediate remedial steps to cure its breaches under the License Agreements. Fibertech responded by letter dated July 2, 2002, denying that it lacked authority to attach to the poles that were the subject of Verizon MA's June 28th letter. *See Clemons Aff.*, Exhs. C and D.

By letter and corrected letter dated July 9, 2002, Verizon MA subsequently confirmed Fibertech's lack of authority for the attachments in Easthampton and certain safety violations resulting there from. Fibertech responded by letter dated July 18, 2002, alleging that Fibertech was authorized to attach to the poles in question by reason of the delays of Verizon and power companies to respond to Fibertech's pole license applications and denying the safety violations. *See Clemons Aff.*, Exhs. E-G. Fibertech

responded with a another letter to Verizon MA on July 26, 2002, in which it again refused to address what it would do to correct the hundreds of unauthorized attachments it had placed on Verizon-owned or jointly owned poles in Massachusetts. *Id.*, at Exh. H.

In light of Fibertech's refusal to take responsibility for the foregoing breaches and safety violations, as well as Verizon MA's subsequent discovery that Fibertech made approximately 700 known unauthorized attachments, Verizon MA gave Fibertech notice, by letter dated July 19, 2002, that if Fibertech failed to remove the unauthorized attachments prior to August 3, 2002, Verizon would take whatever action was necessary, consistent with the terms and conditions of the Aerial License Agreements, to address the unauthorized attachments placed by Fibertech. *Id.*, at Exh. I.

When Fibertech failed to remove its attachments or take any corrective action, Verizon MA gave Fibertech notice of termination by letter dated August 7, 2002, for effect in 30 days, and filed its suit with the Hampden County Superior Court. *See* attached Exhibits 1 and 2.

B. Fibertech's Request for Interim Relief Is Completely without Merit.

Fibertech has clearly breached the terms and conditions of the License Agreements and has defaulted on its obligations thereunder by virtue of making nearly 700 known unlawful attachments to Verizon MA-owned poles, and by failing to construct those attachments in safe manner in compliance with the applicable safety and construction codes as required under the agreements. Fibertech has also violated Mass. Gen. L. ch. 166, § 35, which provides:

A corporation or person maintaining or operating telephone, telegraph, television or other electric wires or any other person who in any manner affixes or causes to be affixed to the property of another any pole, structure, fixture, wire or other apparatus for telephonic, telegraphic,

television or other electrical communication, or who enters upon the property of another for the purpose of affixing the same, without first obtaining the consent of the owner or lawful agent of the owner of such property, shall, on complaint of such owner or his tenant, be punished by a fine of not more than one hundred dollars.

Mass. Gen. L. ch. 166, § 35.

Here, Fibertech affixed its fiber cables to Verizon MA-owned poles without first obtaining a license and, therefore, it did not have Verizon MA's consent. Accordingly, it is clear that Fibertech violated Mass. Gen. L. ch. 166, § 35, and Fibertech is subject to fines of not more than \$100 for each such violation.

Fibertech has not denied, nor can it, that it has placed the attachments on poles covered by the License Agreements without having licenses from Verizon MA and WMECO or the required municipal permits. On the contrary, Fibertech merely contends that it had a right to make the attachments in question because of alleged delays in the licensing process. *See* Complaint at ¶10. Based on that totally unsupported claim, Fibertech asserts that the Department should grant it interim relief by stopping Verizon MA from enforcing its License Agreements. Fibertech's arguments on this point are completely without merit.

The Superior Court justice ruled that nothing gave Fibertech the right to attach to Verizon MA's poles without a license, even if delays were caused by Verizon MA or WMECO. The Court noted that Fibertech's claim was not supported by the terms of the Parties' License Agreement. *Id.*, at 4-5. The Court also ruled that the claim was not supported by "any appellate case or any decision of any administrative body in this Commonwealth or in any other state" or by "any decision by any Federal court." *Id.*, at 3. In fact, the Court noted that the only case Fibertech cited as authority for its claim,

Cavalier Telephone, LLC v. Virginia Electric and Power Company,² actually supported Verizon MA's and WMECO's position. *Id.*, at 5.³

Fibertech's request for interim relief here would effectively void the Court's ruling and should be rejected by the Department. Verizon MA has properly sought to enforce its License Agreements by bringing the court action, and the Department should not take any steps that would limit Verizon MA's ability to pursue its rights under the License Agreements. As in the Superior Court action, Fibertech has presented nothing to the Department that even remotely supports its purported right to attach to Verizon MA's poles without a license. The Department should reject Fibertech's effort to absolve it of its own irresponsible and unlawful behavior.

The Court expressly addressed the claim Fibertech makes to the Department that it will suffer irreparable harm if Verizon MA is forced by Fibertech's action to terminate its License Agreements or to remove illegal Fibertech attachments. The Superior Court

² 15 F.C.C.R. 9563, 2000 WL 1060425 (FCC).

³ The simple facts are that Fibertech's own actions are the principal cause of any delays it experienced in gaining access to Verizon MA's poles. Since about October of 2000 Verizon MA has worked closely with Fibertech in connection with its applications for pole attachments in Massachusetts, advising the company of the steps necessary to secure its requested attachments. *See Leone Aff.*, at ¶ 10. Almost from the beginning, Fibertech has been unwilling or slow to comply with the licensing requirements. *Id.*, at ¶ 11. Instead of following the licensing requirements set forth in the applicable agreements, Fibertech spent a substantial amount of time and energy objecting to those requirements. *Id.* The disarray within Fibertech's business and its unwillingness to follow documented processes for gaining access to Verizon MA's poles and conduit lie at the root of its problems.

Some of the types of conduct that delayed Fibertech obtaining licenses were: incomplete and erroneous applications; regular changes in the scope of Fibertech's network affecting the routing of pole and conduit routes; failure to assign sufficient personnel to projects so that necessary steps in the process could be completed in a timely manner, such as field surveys; repeated changes in project managers; failure to pay or delays in paying field survey and make-ready charges; failure to respond to Verizon MA's efforts to schedule field surveys; requests for multiple field surveys; cancellation of project management meetings; and placing applications on hold for indefinite periods. Indeed, a Fibertech manager even felt the need to apologize to his Verizon MA contact for "the runaround you have received from our Company" noting the confusion at Fibertech caused by the repeated turn-over of project managers at the company. *See Exhibit 6* attached to this Answer. To the extent Fibertech encountered delays in the licensing process, they were largely attributable to Fibertech's

correctly noted that to the extent Fibertech would suffer any harm it is solely attributable to its improper conduct. The Superior Court found:

Fibertech deliberately resorted to self help, before instituting proceedings at the [Department] and before advising [Verizon MA and WMECO] of its intention to make attachments, in order to present [Verizon MA and WEMCO] and the [Department] or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fbortech and subject it to undue and wasteful costs. Therefore, Fibertech's claims of irreparable harm should not be given significant weight by the Department. Having unjustifiably and, in this Court's view, unlawfully created the likelihood of precisely the injunctive relief which it now contends will irreparably harm it and offering no compelling reason why court or DTE approval could not have been sought before erecting the attachments, Fibertech is in no position to argue that any harm it might suffer from preliminary relief outweighs the harm to [Verizon and WEMCO] which would result from permitting the attachments to remain in place.

Exhibit 3, at 8. While the Court was addressing the issue of preliminary injunctive relief, the same arguments are applicable to Fibertech's claims for interim relief.

The Department should not reward Fibertech's improper conduct by granting its request for interim relief. Indeed, if the Department were to grant such relief, it would effectively negate the Superior Court's order and create a serious jurisdictional conflict between the Department and the Court. It would also reward Fibertech for its unlawful behavior and send the wrong message to other carriers who maintain attachments on Verizon MA's solely and jointly-owned poles in Massachusetts. Indeed, sanctioning Fibertech's behavior here would signal other firms that they could proceed without

unwillingness or inability to comply with its obligations in connection with that process. See Leone Aff., at ¶¶12-15.

consequence to violate the terms of their own License Agreements thereby potentially undermining Verizon MA's and WEMCO's ability to manage their plant and provide access to poles on a nondiscriminatory basis.⁴

Verizon MA is seeking only to require Fibertech to comply with the terms of its License Agreements and the applicable laws, regulations, codes, construction and safety standards and the like to which Fibertech contractually agreed and is legally obligated to comply. Fibertech provides no basis for the Department to ignore the License Agreements, Massachusetts law, and the Superior Court's order by granting it interim relief. The Department should, accordingly, deny its request.

III. VERIZON MA'S ANSWER TO THE NUMBERED PARAGRAPHS OF THE COMPLAINT.

Responding to the specific claims set forth in Fibertech's Complaint, Verizon MA states as follows with respect to each of the numbered paragraphs:

1. This paragraph of the Complaint sets forth a legal conclusion to which further response is unnecessary.

2. Verizon MA denies the allegations in this paragraph of the Complaint. Specifically, Verizon MA denies that it has delayed or denied Fibertech access to poles and conduits in Massachusetts or has attempted to charge Fibertech inflated and

⁴ In its request for interim relief, Fibertech not only asks that the Department stop Verizon MA from pursuing its contractual right to terminate the License Agreements if Fibertech does not cure its breach, but it also asks the Department to absolve it from paying make-ready charges and to prohibit Verizon MA from "taking any retaliatory action against Fibertech." Complaint at p. 14. Fibertech has, of course, presented no basis for the Department to relieve it of the obligation to pay any make-ready charges. In addition, Verizon MA has not even hinted that it intends to take any action against Fibertech except to demand compliance with the terms of the License Agreements. Verizon MA continues to process license applications and issue licenses to Fibertech under its License Agreements. The only party that has taken any retaliatory action here has been Fibertech through the filing of this frivolous Complaint.

inappropriate make-ready charges as a condition for Fibertech accessing Verizon MA's poles, conduits and rights of way.

3. Verizon MA denies the allegations in this paragraph of the Complaint. The claim that Verizon MA has acted in an anti-competitive and discriminatory manner is not supported by any facts set forth in the Complaint or in documents filed with the Complaint.

4. Verizon MA denies that Fibertech is entitled to Interim Relief. As discussed in Sections I and II above, Fibertech has unlawfully attached to Verizon MA's poles in the towns of Agawam, Easthampton, Northampton, and Springfield in violation of the parties License Agreements and Massachusetts law. Verizon MA is attempting to enforce the terms of its License Agreements, which are just and reasonable, and Fibertech's effort to avoid the consequences of its unlawful actions should be rejected by the Department.

5. Verizon MA does not have information sufficient to form a belief as to the truth or falsity of Fibertech's allegations concerning its corporate structure or its business plans. Verizon MA understands that Fibertech has filed with the Department a Statement of Business Operations and a tariff.

6. Verizon MA admits that it is an Incumbent Local Exchange Carrier as that term is defined in the Telecommunications Act of 1996 with a principal place of business at 185 Franklin Street in Boston. Verizon MA provides a range of telecommunications services to customers throughout Massachusetts, including in the Springfield metropolitan area.

7. This paragraph of the Complaint is addressed to WMECO and a response by Verizon MA is unnecessary.

8. Verizon MA admits that it is subject to the provisions of G.L. c. 166, § 25A and 220 CMR 45.00.

9. Verizon MA admits that it owns poles and conduits to which Fibertech has sought to attach its fiber cables.

10. This paragraph of the Complaint sets forth legal conclusions to which a further response is unnecessary.

11. Verizon MA admits that Fibertech has filed applications with Verizon MA for access to specified poles and conduit in Massachusetts. Verizon MA denies that it has delayed Fibertech's access to those poles and conduits. Verizon MA has licensed Fibertech to attach to approximately 3,300 poles and 56,000 feet of conduit in Massachusetts. The most recent licenses issued by Verizon MA to Fibertech occurred on August 12, 2002. Verizon MA has processed Fibertech's applications for licenses in accordance with Verizon MA's standard practices that are applied in a non-discriminatory manner to all applicants.

12. This paragraph of the Complaint sets forth a legal conclusion to which further response is unnecessary.

13. Verizon MA admits that it entered into an Aerial License Agreement with Fibertech on or about March 7, 2000, and that the document contained in Exhibit A of the Complaint is a copy of that agreement. Verizon MA also admits that it entered into a Conduit License Agreement with Fibertech on or about June 6, 2000, and that the document contained in Exhibit B of the Complaint is a copy of that agreement. Verizon

MA further admits that Fibertech began requesting access to Verizon MA's poles and conduits pursuant to these agreements in 2000.

14. Verizon MA admits that Fibertech entered into an Aerial License Agreement with Verizon MA and WMECO on or about March 31, 2000, and that the document contained in Exhibit C of the Complaint is a copy of that agreement. Verizon MA also admits that Fibertech began requesting access to Verizon MA's poles and conduits pursuant to this agreement in 2000.

15. The Department regulations cited in this paragraph of the Complaint speak for themselves and further response is unnecessary. In addition, the Verizon MA pleading cited in the paragraph speaks for itself and further response is unnecessary.

16. Verizon MA denies the allegations contained in this paragraph of the Complaint as they relate to its conduct. Verizon has received 56 applications for pole attachments from Fibertech in Western Massachusetts covering approximately 3,864 poles. Of these applications, 40 were cancelled by Fibertech covering approximately 3,149 poles.

17. Verizon MA lacks sufficient information to determine to a reasonable degree of certainty what Fibertech means when it refers to the "Springfield Region" and, therefore, can neither admit nor deny the allegations contained in this paragraph. To the extent further answer is deemed required, Verizon MA denies the allegations contained in this paragraph.

18. Verizon MA denies the allegations in this paragraph of the Complaint as they relate to its conduct.

19. Verizon MA denies the allegations in this paragraph of the Complaint as they relate to its conduct.

20. Verizon MA denies the allegations in this paragraph of the Complaint as they relate to its conduct. Specifically, Verizon MA denies that there is any decision or rule of the Federal Communications Commission or this Department which authorized Fibertech to place attachments on Verizon MA's poles and conduits without first receiving a license.

21. Verizon MA denies that it fails to conform to applicable federal and state standards governing the practices by which it provides access to poles or conduits.

22. Verizon MA denies the allegations in this paragraph of the Complaint.

23. Verizon MA is without sufficient information to admit or deny the time frame in which Fibertech placed the illegal attachments on Verizon MA's poles. Verizon MA denies that any licenses were "deemed granted" as no such authority exists under the Parties' License Agreements or applicable state or federal law.

24. Verizon MA Verizon MA denies the allegations in this paragraph of the Complaint as they relate to its conduct.

25. Verizon MA agrees that Fibertech Vice President and Corporate Counsel Charles Stockdale contacted Mr. Beausejour on June 24, 2002. Verizon MA denies that the substance of their discussion was as characterized in this paragraph of the Complaint as well as in paragraph 26.

26. See the response to paragraph 25.

27. Verizon MA admits that there was a meeting with Fibertech on July 17, 2002, at which WMECO representatives were also present. Verizon MA denies that

Fibertech was not informed that the meeting would address the unauthorized attachment by Fibertech of facilities on various poles and conduit of Verizon MA. Verizon MA states that the meeting adjourned because Fibertech appeared at the meeting with its counsel, whereas Verizon MA was not represented by counsel, and Fibertech refused to continue the meeting with only its non-legal management personal.

28. Verizon MA denies that it has threatened to dismantle or otherwise interfere with Fibertech's facilities. Rather, Verizon MA served upon Fibertech a notice as provided for in the Article XVIII(A) of the Parties' License Agreements that, unless Fibertech cures its material breach of the agreement by removing its existing illegal attachments within 30 days, Fibertech's pole License Agreements dated March 7, 2000 and March 30, 2000, would be terminated. Verizon MA further denies that the 60-day notice requirement in 220 C.M.R. 45.03(a) is applicable to the facts presented here.

29. Verizon MA denies the allegations in this paragraph of the Complaint. Specifically, Verizon MA denies that it has engaged in any discriminatory or unlawful conduct in its licensing of poles and conduit to Fibertech.

30. As set forth in paragraph 28 above, Verizon MA denies that it has threatened to dismantle or otherwise interfere with Fibertech's facilities. Verizon MA states that Fibertech is the cause of its current position because it has placed illegal attachments on Verizon MA's poles in violation of the Parties' License Agreements and Massachusetts law. The only action that Verizon MA has taken is to serve upon Fibertech a notice as provided for in the Article XVIII(A) of the Parties' License Agreements that, unless Fibertech cures its material breach of the agreement by removing its existing illegal attachments within 30 days, Fibertech's pole License Agreements

dated March 7, 2000 and March 30, 2000, would be terminated. Verizon MA further states that delays that Fibertech has experienced in obtaining access to Verizon MA's poles and conduit are principally the product of its own conduct.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Verizon MA has provided conduit and pole licenses to Fibertech pursuant to License Agreements that have been entered into in good faith by the Verizon MA. Included in those License Agreements are the rates, terms and conditions that have been agreed to by the parties. The rates, terms and conditions in the existing contracts are valid, enforceable, and binding on the parties. Massachusetts General Law c. 166, § 25A authorizes the Department to regulate the rates, terms and conditions applicable to attachments on the poles and in the conduits of a public utility in any case in which the utility and licensee fail to agree. The Department has not been granted authority to abrogate attachment agreements, such as the License Agreements, entered into in good faith.

THIRD AFFIRMATIVE DEFENSE

Fibertech willingly entered into the License Agreements with Verizon MA and is estopped from recovering such relief because of its actions.

FOURTH AFFIRMATIVE DEFENSE

Fibertech lacks clean hands with respect to the allegations made in this Complaint, and is therefore not entitled to any relief.

FIFTH AFFIRMATIVE DEFENSE

The Department does not have authority to direct Verizon MA to issue written licenses nor direct Verizon MA to recognize the licensure of the Fibertech's facilities on the poles in question.

WHEREFORE, for the reasons set forth above, Verizon MA respectfully requests that the Department deny Fibertech's request for interim relief and dismiss its Complaint.

Respectfully submitted,

Verizon New England Inc., d/b/a Verizon
Massachusetts

By its attorneys,

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